

**Remarks by Philadelphia City Commissioners' Chairwoman Lisa Deeley to the
Subcommittee on Elections of the Committee on House Administration
June 22, 2022 2:30PM**

Good afternoon, Chairman Butterfield, Ranking Member Steil, and members of the subcommittee on Elections, I am Commissioner Lisa Deeley, Chairwoman of the Philadelphia City Commissioners, the three-member bipartisan board responsible for voter registration and elections in Philadelphia, Pennsylvania. I am pleased to provide this testimony and I have submitted my full written remarks for the record.

First, I would like to point out that in the current term of Congress, the overwhelming majority of the members were on the ballot in November 2020. So when some of your colleagues choose to spread lies about that election, saying that it was a stolen or that there was fraud, please make sure to remind them that it was their election too. It is remarkable that elected officials never seem willing to cast doubt on their own victory when transmitting lies about another's loss.

I am glad this Congress is holding hearings to examine the serious problem of mis and disinformation. In Philadelphia, our elections have been under attack by false claims for some time now. The result has been the lowering of the public's trust and discouraging them from participating in the electoral process. There is no doubt that you are familiar with some of the more famous instances of misinformation to come out of the City of Brotherly Love.

There was the 2008 instance where two members of the New Black Panthers Party were videotaped standing outside of a polling place that serves a heavily African American precinct. That video was given to Mike Roman, who was at the time a Republican Ward Leader who ran a website dedicated to "fraud, cheating, dirty tricks, absurdity, and other election news", you are probably more familiar with him as the Trump staffer from Pennsylvania who has been subpoenaed by the January 6th Committee. The video went viral. The resulting political fallout played out down here in Washington, it held up confirmation hearings, and was used to attack the Obama Justice Department. This video, of an isolated incident, has been held up as the "Holy Grail" for those who think that elections are stolen or that there is widespread fraud in large, majority-minority, Democratic cities such as Philadelphia.

This was carried over into the 2012 Election, when Mitt Romney did not receive a single vote against Barack Obama in 59 precincts in Philadelphia. These precincts were located in extremely heavy African American neighborhoods in North and West Philadelphia. The Philadelphia Inquirer sent reporters out to locate the and interview the few registered Republicans in these precincts. The ones they did talk to either said they did not know they were registered Republican or that they voted for Obama. No evidence of fraud or intimidation was found. Regardless, of the truth, that did not stop many from spinning what was essentially an expression of voter preference into evidence of fraud. Up until 2020, the "59 precincts claim" was the most often repeated conspiracy about our elections and something that seemed to come up every November.

Things really started to get bad when in 2016, then candidate, Donald Trump became obsessed with Philadelphia, and not in a good way. He became fixated on the idea that he needed to flood the city with poll watchers to prevent the election from being stolen from him.

In the lead up to the 2016 election, Trump told a rally in Altoona, PA “We're gonna watch Pennsylvania. Go down to *certain areas* and watch and study and make sure other people don't come in and vote five times. ... The only way we can lose, in my opinion -- and I really mean this, Pennsylvania -- is if cheating goes on.”

As you listen to those words you can see the seeds that were planted in 2016 with his followers laid the groundwork for the election misinformation on a mammoth scale which we saw in 2020 and culminated in the insurrection that happened here on January 6, 2021.

Being in the middle of the mis and disinformation around the 2020 Election is really the most surreal experience that has ever happened to me. I would sit there inside the Pennsylvania Convention Center, where the counting of the mail ballots took place, looking at what was actually going on but then reading and seeing all this incorrect information being disseminated about what was happening. It was like reading about an alternative dimension. I would read that we had barred watchers, locked out watchers, and even “roughed up watchers” but then I would look up and see them all, both Democrat, Republican, and even a few from the Green Party, sitting in a semi-circle talking to each other as votes were being counted in front of them.

Probably the most ridiculous story of the entire 2020 election was published by the Buffalo Chronicle. To sum up the story. Democratic operatives who were working in the department apparently provided crates of quote unquote “raw ballots”, to a Philadelphia mobster. From there, according to the anonymous source, they were taken to South Philly and in 60 hours 300,000 ballots were marked for Joe Biden using, an oddly specific detail, of a sharpie. They were then packaged into non-descript cardboard boxes and dropped off outside the Pennsylvania Convention Center. For this the mob was supposedly paid \$3 million. But here is the kicker, the mobster was reportedly ready to flip on Joe Biden and provide primetime Congressional testimony in exchange for a pardon from Donald Trump because of the book and movie deals and because “He wants a clean record. He wants to fish and hunt on federal lands. He’d really like a job with the National Parks Service. You need a clean record to get those things,” quoted another anonymous confidant.

It was so out there and was from a publication that nobody had ever heard of that originally, my staff and I, thought it was a joke story when it showed up in the clips, like something that the Onion would publish. It was not until we started to get calls from established media outlets and fact checking organizations that we realized that it was not a joke.

The story was tweeted by the son of one of Trump’s lawyers, which turned into its own story. Later, Rudy Giuliani mentioned it on Fox Business calling it “an allegation” but even he had to add that was “far fetched”.

It turns out the Buffalo Chronicle is a known disinformation site run by Matthew Ricchiazzi, a self-described “pro-Trump” political consultant in western New York. The site had previously been investigated by the Toronto Star and Canadian Broadcasting Corporation for false stories relating to the 2019 Election in Canada. The CDC sent a reporter to the address listed as their headquarters in Buffalo, NY and, almost stereotypically, it was an abandoned building.

During the count, Trump's Pennsylvania Political Director, who was working for Mike Roman, the same Mike Roman who I would remind you was later subpoenaed by the January 6th Committee, followed me out of the Convention Center shoving a camera in my face and accusing me of keeping the Trump campaign out of the count. The video was posted on Twitter, Rumble, Parler, and other social media sites. The comments on that video ranged from mean comments about my weight, to comments that I should be in jail, to comments that escalated to threats of violence against me. One literally just wrote the word "rope" over and over again. At least one of these threats raised a red flag with law enforcement. I was told that I would be receiving two police officers who would follow me around everywhere, even inside the Convention Center where we were supposed to be safe, even when I went to the bathroom, one of them had to escort me. This was not optional, when I say I was told, there was no option, I was told by the police that this would be happening. That same week, two men were arrested outside the Convention Center, who drove from Virginia with lock picking tools, ammo, and guns, including an AR-15, the mass murder's weapon of choice.

Due to security concerns, myself, my fellow Commissioners, and some of our staff moved into a hotel attached to the Convention Center for our safety. Unfortunately, our families were not with us. I sent my mother out of the state. Commissioner Schmidt had to send his family out of the area after threats with his children's names were texted to his wife. Even our staff was not immune from having threats made against them. As chair, my office was responsible for requesting and coordinating the police protection for my colleagues and staff. At one point all three of the elected commissioners or their families were under some level of police protection. It was around this time that a screen shot from the "Contact Us" page on our website showing the office room numbers for the individual commissioners was menacingly posted as a response to one comment. Those office numbers were removed, and they have not returned because of this reason. That is how bad it got. We spent over a half million dollars on security that election, there is a police annex inside the Convention Center, but things were so crazy that was not enough, and I had to call in the Sheriff, who handles the security for the courts in Philadelphia. She showed up with an additional 40 Sheriff's deputies to secure the area.

Security remains a big legacy for us since the 2020 Election. We have since moved out of the temporary location at the Convention Center to our permanent ballot processing center. The city is spending millions of dollars to upgrade the facility, adding fencing, bullet proof glass, and metal detectors. Before 2020, in the history of Philadelphia elections, we have never hired private security. Since 2020, we have not held an election without them. We expect to pay \$500,000 for private security in the upcoming fiscal year. Before 2020, we were much more open and accessible to the public. Anyone could wonder into our area of city hall and ask for directions. Now we ask that the doors remain locked, and that people call to be let in out for concern for our and our staff's safety.

The thing that made the mis and disinformation that we saw in 2020 so dangerous was how the President of the United States, his campaign, his legal team, and questionable "media" would work off of one another, feeding a spiral of mistrust among the American people where we see even years later many do not know what is true and what is not. These efforts began before

Election Day 2020. In the summer, after our Primary and as the President continued to attack voting by mail, the Trump campaign sued Pennsylvania over the use of drop boxes, its filings parroting the claims by their client. Gnarring headlines, spreading false claims, and generating new claims from the depths of the internet, and actors impersonating as news reporters on so called news networks that just competed with one another to see who could be the most outlandish in order to gain more viewers from Trump's followers. They lost that lawsuit too.

When we opened our satellite election offices, the Trump campaign purposely sent operatives, such as their political director, to the offices to video themselves getting kicked out. These videos were then edited and posted online to accuse us of doing something nefarious. This is known as a false flag operation. In fact, after he was removed from City Hall, the political director put his camera away and asked if he could go back in to vote, he was allowed to do so. That night Trump declared "Bad things happen in Philadelphia" during a Presidential debate seen by tens of millions of people. My phone started blowing up. This was followed up by a lawsuit regarding watchers' access which stated, "Bad things are happening in Philadelphia". They lost that lawsuit. But the use of these lawsuits to reinforce and give validation to the misinformation only helped cement the lies into people's minds. They trust the law and if it is in a lawsuit then it must be true. This continued and got worse after the election with lawsuits parroting the claims about observers' access, trying to throw out all the mail ballots in the State of Pennsylvania, the so called "Kraken" lawsuits. Rudy Giuliani was even on TV talking about how many lawsuits they had as proof that they were going to reverse the election results. But they lost them all, some of the lawyers lost their ability to practice, some were sanctioned, but too many have not been punished for their role in all of it and continue to practice. Some are now currently working on races in 2022.

Before, I wrap up I just would like to acknowledge that mis and disinformation is not exclusively something of the right and Donald Trump. In fact, we had to deal with plenty of false information being spread by those on the left, including Jill Stein in 2019, about our new voting system in Philadelphia. We spend a significant amount of time debunking false and misleading claims, and defeating legal challenges she raised. As a country, we all need to make sure that we are getting information from trusted sources. People posting and sharing videos on Facebook and Twitter, even those who title themselves as experts, may not be the best place to gather your facts.

I would like to conclude my testimony by speaking to those watching today who still believe the misinformation from the 2020 election, by trying to put you in my shoes and tell you how it has been from my perspective. Imagine you are a farmer who grows corn and you have grown it for years. Then you start reading on social media about the Truffula fruit that you are growing. You think "who could possibly believe that?" as you look out your window and see your workers harvesting your corn and not a fictional fruit from a Dr. Seuss book. Then the President of the United States starts talking about your Truffula fruit, people come to your farm, see your corn but allege that you are hiding your Truffula tree. People threaten your life and the lives of some of your fellow farmers. The police have to come and follow you around as if you are the president or something. Even after the corn harvest is done, people are still talking about the

Truffula fruit, even those who bought your corn and are satisfied. People, still to this day, including your high school friends and classmates, post Truffula fruit comments on EVERY SINGLE one of your Facebook posts. Even your friends will not mention it in front of you but by their comments you know they think that you did grow a crop of Truffula fruit. Now two years later you are invited to testify before Congress, you who could not financially afford to finish college and was working at ACME before working your way up state and city government to become a corn farmer, but what do they want you to testify about? Why people think you grew Truffula fruit. Oh joy, the topic that just will not go away. Well just like there is no Truffula fruit, there was no fraud, there was no steal. I and my fellow election professionals are human beings who take pride in running free and fair elections. Sometimes people lose elections because they get fewer votes.

Thank you and I am happy to answer questions if you have them.

Attachments



Opinion



GOP poll watcher behind 2008 New Black Panther video is anti-Trump

Donald Trump is hammering away in the closing days of his presidential campaign with a claim that doubles as an excuse if he loses on Nov. 8.

by By Chris Brennan, Columnist | Columnist
Published Oct 23, 2016

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Donald Trump is hammering away in the closing days of his presidential campaign with a claim that doubles as an excuse if he loses on Nov. 8.

The election is "rigged," Trump repeatedly insists, stolen through voter fraud at polling places in big cities such as Philadelphia.

Trump's supporters at his packed rallies cheer when he makes this claim. But their candidate can't back it up with convincing evidence.

Instead, he presents anecdotal accounts of dastardly behavior in past elections.

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Long story short: Two NBPP members wearing black fatigues and berets stood outside a polling place on Fairmount Avenue near 12th Street. One had a Democratic certificate as a poll watcher. The other had a nightstick.

A Republican poll watcher called in a complaint.

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Another Republican poll watcher, Stephen Robert Morse, showed up and videotaped a terse but peaceful encounter he had with the NBPP members.

Morse gave that video to Election Journal, a website dedicated to "fraud, cheating, dirty tricks, absurdity and other election news," run by Mike Roman, a former Republican leader of Northeast Philadelphia's 56th Ward.

The video went viral, with more than 1.9 million YouTube views as of last week. It is the Holy Grail of conservative suspicions about voter fraud.

"Security" patrols stationed at polling plac...

No voter complained about the NBPP members standing in front of the polling place. That doesn't seem to have mattered.

What followed was a political struggle within the U.S. Department of Justice about what to do, as then-President George W. Bush was exiting office and President Obama was taking over the White House. Cases were filed. Cases were dropped.

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Fox News played up the NBPP incident for ages.

And here was pro-Trump pundit Kayleigh McEnany explaining his "rigged" rhetoric on CNN last Thursday: "I think he's setting up a scenario where he wants supporters to be vigilant. He doesn't want a scenario where there's New Black Panthers outside with guns, essentially, like, intimidating people from coming into the polls."

The 2008 NBPP video now gives rise to a divergence of opinion about Trump's candidacy.

Morse, who shot the video, still thinks the NBPP members were in the wrong. But he calls Trump's candidacy "sickening," given his controversial comments about women, minorities, and immigrants.

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And Morse, who knows the rules of poll watching, says Trump is trying to "stoke a fire" by calling on his supporters at rallies throughout Pennsylvania to come to Philadelphia to observe voting on Election Day.

State law requires poll watchers to be registered to vote in the county where they serve. Trump's supporters, by law, can't just show up for the job in Philadelphia if they're registered in another county.

"Could trouble be brewing? Absolutely," Morse said. "Will Trump try to claim there's voter fraud and other problems that Fox News and others might disseminate and repeat? Of course."

Roman, who disseminated Morse's 2008 video, signed on last week as an "election protection" adviser for Trump's campaign. He declined to comment.

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Morse, who moved to England and just received a master's degree in business administration from Oxford University, was a producer on the 2016 Netflix documentary *Amanda Knox*, about the American woman's troubles while she was an exchange student in Italy: She was convicted of killing her British roommate and spent almost four years in prison before being released.

Morse calls 2008 "a good lesson" in why he has chosen to stay out of politics since then. He still marvels at the power of the video. "There was a nut and I was in the right place at the right time," he said. "There was a camera and I pressed record."



Published Oct. 23, 2016



By Chris Brennan, Columnist



Politics



In 59 Philadelphia voting divisions, Mitt Romney got zero votes

It's one thing for a Democratic presidential candidate to dominate a Democratic city like Philadelphia, but check out this head-spinning figure: In 59 voting divisions in the city, Mitt Romney received not one vote. Zero. Zilch.



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Gov. Mitt Romney waves to the crowd as he arrives at Shady Brook Farm in Yardley, PA. for a campaign rally. Thousands braved the cold for hours just 2 days before the Preside ... [Read more](#)

by By Miriam Hill, Andrew Seidman, and John Duchneskie, Inquirer Staff Writers
Published Nov 4, 2015

Originally published on Nov. 12, 2012.

It's one thing for a Democratic presidential candidate to dominate a Democratic city like Philadelphia, but check out this head-spinning

"We have always had these dense urban corridors that are extremely Democratic," said Jonathan Rodden, a political science professor at Stanford University. "It's kind of an urban fact, and you are looking at the extreme end of it in Philadelphia."

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Most big cities are politically homogeneous, with 75 percent to 80 percent of voters identifying as Democrats.

Cities are not only bursting with Democrats: They are easier to organize than rural areas where people live far apart from one another, said Sasha Issenberg, author of *The Victory Lab: The Secret Science of Winning Campaigns*.

"One reason Democrats can maximize votes in Philadelphia is that it's very easy to knock on every door," Issenberg said.

Still, was there not one contrarian voter in those 59 divisions, where unofficial vote tallies have President Obama outscoring Romney by a combined 19,605 to 0?

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The unanimous support for Obama in these Philadelphia neighborhoods - clustered in almost exclusively black sections of West and North Philadelphia - fertilizes fears of fraud, despite little hard evidence.

Upon hearing the numbers, Steve Miskin, a spokesman for Republicans in the Pennsylvania House of Representatives, brought up his party's voter-identification initiative - which was held off for this election - and said, "We believe we need to continue ensuring the integrity of the ballot."

The absence of a voter-ID law, however, would not stop anyone from voting for a Republican candidate.

Larry Sabato, a political scientist at the University of Virginia who has studied African American precincts, said he had occasionally seen 100 percent of the vote go for the Democratic candidate. Chicago and Atlanta each had precincts that registered no votes for Republican Sen. John McCain in 2008.

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"I'd be surprised if there weren't a handful of precincts that didn't cast a vote for Romney," he said. But the number of zero precincts in Philadelphia deserves examination, Sabato added.

"Not a single vote for Romney or even an error? That's worth looking into," he said.

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Take North Philadelphia's 28th Ward, third division, bounded by York, 24th, and 28th Streets and Susquehanna Avenue.

About 94 percent of the 633 people who live in that division are black. Seven white residents were counted in the 2010 census.

In the entire 28th Ward, Romney received only 34 votes to Obama's 5,920.

Although voter registration lists, which often contain outdated information, show 12 Republicans live in the ward's third division, The Inquirer was unable to find any of them by calling or visiting their homes.

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Four of the registered Republicans no longer lived there; four others didn't answer their doors. City Board of Elections registration data say a registered Republican used to live at 25th and York Streets, but none of the neighbors across the street Friday knew him. Cathy Santos, 56, founder of the National Alliance of Women Veterans, had one theory: "We ran him out of town!" she said and laughed.

told that city data had him listed as a registered Republican. "I got to check on that," said Sapp, who voted for Obama.

Eighteen Republicans reportedly live in the nearby 15th Division, according to city registration records. The 15th has the distinction of pitching two straight Republican shutouts - zero votes for McCain in 2008, zero for Romney on Tuesday. Oh, and 13 other city divisions did the same thing in 2008 and 2012.

Three of the 15th's registered Republicans were listed as living in the same apartment, but the tenant there said he had never heard of them. The addresses of several others could not be found.

On West Albert Street, Duke Dunston says he knows he's a registered Republican, but he's never voted for one.

The leader of the 28th Ward is Democrat Anthony Clark, who grew up under the tutelage of the late power broker and Democratic ward leader Carol Ann Campbell. Clark is also a city commissioner, one of three elected officials who oversee Philadelphia elections.

"In the African American community from 33d to 24th between Ridge and Somerset, there is a large population of Democrats and there are not many Republicans in there at all. I think it's the issues. People are not feeling that Romney is in touch with them," Clark said.

Despite the Democratic advantage in the 28th Ward, Clark says he also makes sure party workers are getting the vote out.

"People get out, give out literature, talk to people about the issues. Also, they work the polls," Clark said. "People know them in their divisions."

Clark struggled to recall anyone in his area who ever identified as a Republican. Though that is not something anyone would likely volunteer to a Democratic ward leader, Clark eventually remembered Lewis Harris, the GOP leader in the nearby 29th ward, and that rare species: an urban black Republican.

Harris, in an interview, said he works for the GOP mostly because he believes city neighborhoods need attention from both parties.

"I open the door to the community and let them be exposed to diversity in the political party," Harris said. "I want political community-based leverage."

to exit polls, so it's not surprising that in some parts of Philadelphia, the president did even better than that.

In the entire city, Obama got 85 percent of the vote. His worst showing was in South Philadelphia's 26th Ward. There, the president garnered 52.3 percent of the vote, compared to 46.6 percent for Romney.

Paula Terreri, 57, a 26th Ward Republican who describes herself as a devout Catholic, said outside the polls on Tuesday that she voted for Romney because she opposed abortion.

Many parts of Philadelphia and other big cities simply lack Republican voters, a fact of campaigning that has been true since Franklin D. Roosevelt's New Deal, Stanford University's Rodden said.

In 2008, McCain got zero votes in 57 Philadelphia voting divisions. That was a big increase from 2004, when George W. Bush was blanked in just five divisions.

As the first African American president, Obama held immense appeal to black voters, but skin color is only part of the story, said Mark Sawyer, a political science professor at UCLA.

Previous Republican candidates, including Richard Nixon and Jack Kemp, supported affirmative action and urban development, but their party has abandoned those stances, Sawyer said.

Romney's comments, including talking about people who want "more free stuff from the government" after a visit to the NAACP, only further distanced African Americans who felt the comments played to stereotypes about welfare, Sawyer said.

Inquirer Staff Writer Bob Warner contributed to this report.

Contact Miriam Hill at 215-854-5520, hillmb@phillynews.com, or follow @miriamhill on Twitter.

Published Nov. 4, 2015



By Miriam Hill, Andrew Seidman, and John Duchneskie, Inquirer Staff Writers



EXCLUSIVE: How a Philly mob boss stole the election — and why he may flip on Joe Biden



The innermost circles of the American mafia are abuzz. The Boss of the Philly mob — **‘Skinny Joey’ Merlino** — is taking a victory strut, hobnobbing around the highest echelons of old-time mafia folk, mostly in Florida, describing what may have been the heist of the century: the 2020 presidential election.

The feat is drawing praise from far-flung corners of the Italian American business community, which sees the thanks of a grateful administration as key to the revival of the community’s political influence.

But an associate says that Merlino might just be willing to flip on **Joe Biden** and the Pennsylvania political operatives who ordered up some 300,000 election ballots marked for Biden. The source alleges that Merlino and a lean team of associates manufactured those ballots at a rate of \$10 per ballot — a whopping \$3 million for three days of work. They were then packaged into non-descript cardboard boxes and dropped off outside the Philadelphia Convention Center.

Sources who spoke to *The Chronicle* on the condition of anonymity say that Merlino picked up those ballots from two private households where a trusted handful of associates were busily marking ballots with Sharpie markers. They were paid more than \$1,000 per hour, often producing thousands of ballots every hour for more than 60 nearly-consecutive hours.

The ballots were purchased in cash.



'Skinny Joey' Merlino was granted early release from a two-year prison stint earlier this year. If President Trump is willing to offer him a full pardon for current misdeeds and an expungement of past misdeeds, Merlino would be likely to offer stunning testimony before Congress about how the election was stolen.

It's thought that Democratic Party operatives working inside Philadelphia's election office provided Merlino with crates of raw ballots just hours before polls closed on election night, which he transported to two private households in South Philadelphia. By 10 p.m. that night Merlino's operation was already generating more than 3,000 ballots per hour, which quickly scaled to more than 6,000 ballots per hour before midnight.

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But now, Merlino might just be willing to flip on Biden — in primetime Congressional testimony — if President **Donald J. Trump** is willing to issue the longtime mobster a full expungement of his decades-long criminal record. And, of course, Merlino wants to be pardoned for the election fraud itself and any crimes to which he may incriminate himself during his testimony.

“He wants a clean record. He wants to fish and hunt on federal lands. He’d really like a job with the National Parks Service. You need a clean record to get those things,” explains one confidant. “But most of all he wants the thanks of a grateful nation for coming forward.”



Some have postulated that Merlino would be well suited to host a new Bravo series under development called “The Real Gentlemen of Philadelphia”, modeled loosely on that network’s ‘Real Housewives’ franchise. That deal could come with a \$2 million per season paycheck.

“He wouldn’t mind a little fame — or a lot of fame,” he jokes. “If he comes forward he’ll probably get a book deal and a movie franchise.”

Political observers believe that Merlino could sell the rights of his story to a major Hollywood production studio for more than \$20 million, and a book deal could yield as much as \$10 million.

“You have to understand the thing about Skinny Joey is that he is very charismatic and knows how to tell an enthralling story,” the associate explains. “He’d be an incredible movie narrator, and he’d perform excellently in congressional testimony. He could hit that testimony so far out of the ballpark that he becomes a superstar instantaneously – a real celebrity presence.”

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The damning congressional testimony – being tentatively dubbed ‘The Biggest Heist in Political History’ – could make it politically impossible for the Republican-controlled legislature in Pennsylvania to certify the State’s 20 electoral votes.



It’s alleged that Skinny Joey Merlino manufactured more than 300,000 ballots for Joe Biden, and then transported them in nondescript cardboard boxes to a backroom at the Philadelphia Convention Center. From there, the ballots were scanned into

ballot boxes and were then co-located with actual election ballots being prepared for processing, according to an associate who was made familiar with the operation.

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NEW YORK

President Trump's lawyer puts Philadelphia mobster 'Skinny Joey' Merlino at center of election conspiracy

By Stephen Rex Brown and Larry McShane
New York Daily News • Nov 17, 2020 at 10:02 am



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Here's the skinny from reputed Philadelphia mob boss Joey Merlino: He's not cooperating with anybody, including Joe Biden.

A lawyer linked to President Trump retweeted a bizarre allegation that the Mafia veteran was set to flip and inform authorities about a supposed \$3 million scheme to forge ballots in Philadelphia for President-elect Biden — prompting an adamant repudiation Tuesday from the famously close-mouthed wiseguy.

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“My client categorically denies all the allegations and Joey would rather die than ever be a snitch,” said attorney John Meringolo about the report asserting the mobster known as “Skinny Joey” helped manufacture 300,000 illegal ballots in the battleground state.



Joseph 'Skinny Joey' Merlino in 2018. (Mark Lennihan/AP)

The tall tale was first reported in The Buffalo Chronicle, which regularly publishes misinformation. That story was then retweeted Monday by attorney Jordan Sekulow, the son of one of Trump’s top lawyers, Jay Sekulow.

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“These people are crazy!” Merlino told his attorney after reading the story.

Even one-time mob buster-turned-Trump lawyer Rudolph Giuliani scoffed at the supposed Mafia involvement on behalf of the Biden campaign.

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"There is an allegation about a mobster, but I think it's a far-fetched one," he said in a Tuesday interview on Fox Business.

Merlino, 58, is currently serving supervised release in Florida after a 2018 plea deal. The son of South Philadelphia rose to head of the city’s crime family following a bloody mid-'90s internal war.

He has remained resolutely silent about the Mafia despite a pair of federal trials, and announced in a 2013 interview that he was out of the mob life and enjoying life in his Florida home.



The conspiracy theory of election theft emerged over the weekend, insisting Merlino was paid \$10 per ballot and worked non-stop with his team for 60 consecutive hours.

Meringolo said the theory was “out of control” and he was fielding calls asking about its veracity.

Merlino memorably endorsed Trump’s loathing for snitches after he was [sentenced to two years](#) in prison for illegal gambling.

“President Trump was right,” he said with a chuckle in October 2018. “They need to outlaw the flippers.”



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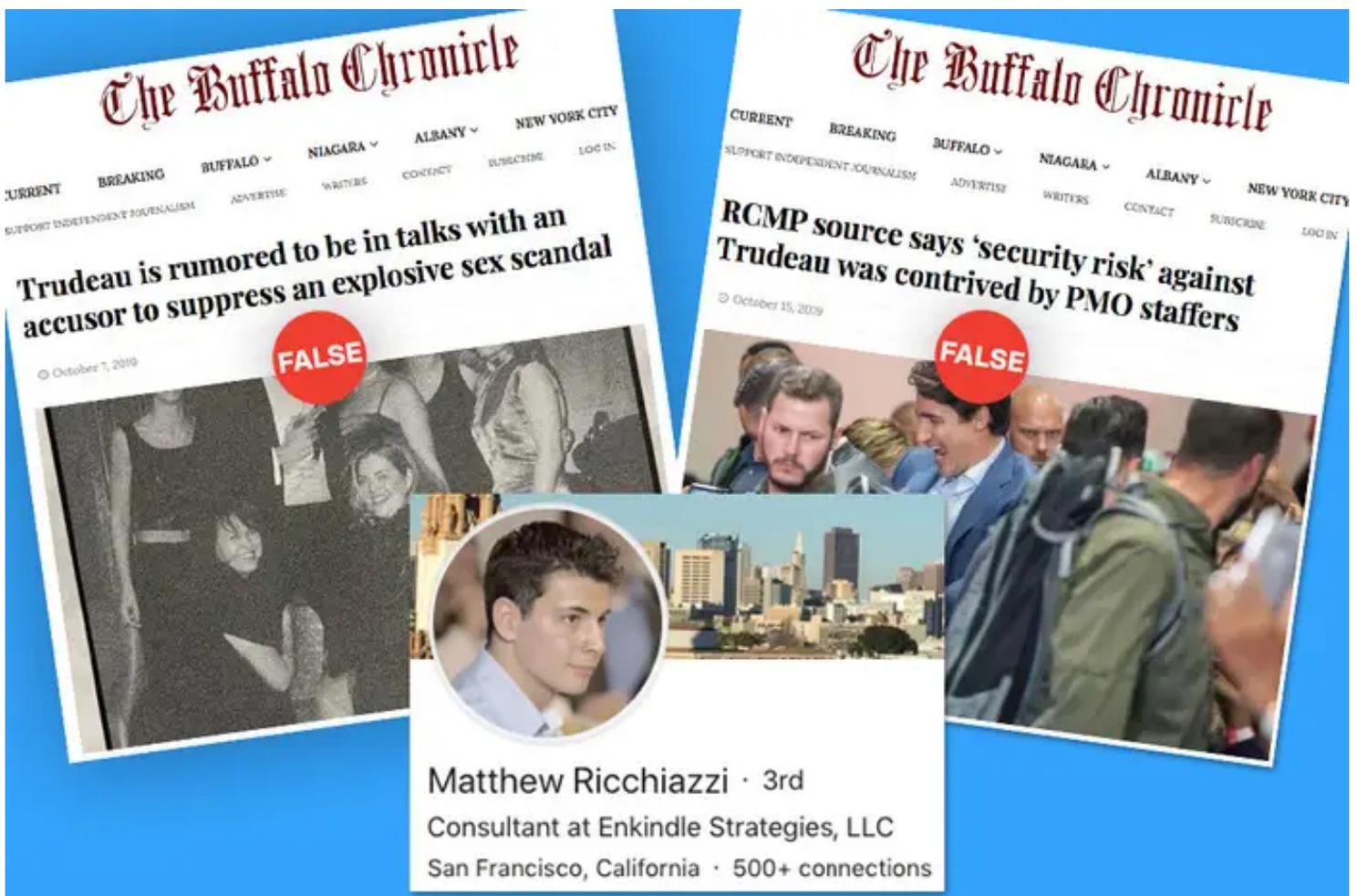
Matthew Ricchiazzi has written debunked stories about Canadian politics and once told a US candidate he'd publish "negative articles about [their] opponents" for \$400 apiece.

By
Jane Lytvynenko and
Marco Chown Oved and
Craig Silverman

Posted on October 18, 2019, 8:03 pm

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Buffalo Chronicle / LinkedIn

Despite Ottawa's widespread efforts to prevent online disinformation from distorting the election campaign, a website based in Buffalo, New York, has been freely posting viral stories about Canadian

politicians that have no apparent basis in fact — and there’s nothing the Canadian government can do to stop it.

Since the beginning of the year, the Buffalo Chronicle has published unsigned articles based on unnamed sources that allege backroom dealings at the highest levels of the Canadian government. Several of the stories have been deemed false or unsupported by news organizations, including the Agence France-Press, which was contracted by Facebook to debunk fake news.

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The website is run by Matthew Ricchiazzi, 33, an Ivy League graduate who has sought office in several New York state elections but never got his name on the ballot.

A BuzzFeed News–Toronto Star investigation has confirmed that Ricchiazzi once offered to publish positive or negative coverage of political candidates for a fee. He also placed ads on his website for individuals and businesses that had never heard of him.

Ricchiazzi would not agree to an interview before next week’s election. However, in a reply to emailed questions, he wrote: “We report in good faith and would never knowingly publish a falsehood. We are confident in all of our reporting to date, and believe it reflects a fair articulation of information obtained from confidential sources.”

Among the apparently uncorroborated stories published by the Buffalo Chronicle is one alleging former Supreme Court justice Frank Iacobucci “insisted” that former attorney general Jody Wilson-Raybould be kicked out of the cabinet. Another claims the former CEO of SNC-Lavalin and his wife fled Canada to avoid being arrested on bribery charges.

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The website found real success with its report earlier this month that Liberal Leader Justin Trudeau paid more than \$2 million to suppress a report about sexual misconduct. Despite being debunked by [the Star](#), [Snopes](#), and the [Agence France-Presse](#), that story and its follow-up generated close to 100,000 shares, likes, and reactions on Facebook.

While the Buffalo Chronicle has been publishing stories about politics in western New York since 2014, a shift to sensational Canadian content earlier this year has brought Ricchiazzi success on social media. Eight of the Buffalo Chronicle's 10 most popular articles on Facebook are about Canadian subjects and were published in the last eight months. Collectively, they were liked, commented on, and shared on Facebook more than 200,000 times by accounts with a total of 4.4 million fans.

Facebook has refused to take down the Buffalo Chronicle posts. "Misinformation as a whole does not violate our community standards," a Facebook spokesperson said. "We don't have a rule that says that everything you post needs to be true."

This week, Ricchiazzi and the Buffalo Chronicle have had their Twitter accounts suspended. However, the posts remain online.

Earlier this year, the Canadian government passed reforms to the Canada Elections Act that ban certain false statements about candidates during an election.

The office of the commissioner of Canadian elections declined to address any specific examples of potential breaches of election law. Spokesperson Michelle Laliberté acknowledged, however, that "there may be limits to the enforcement action that could be taken against individuals residing outside of Canada."

Michael Pal, a professor of law at the University of Ottawa, said it's clear the law applies to foreigners, "but there's not a lot that can be done."

"We have to start facing up to what does it mean to have media from across the border violating the law," he said. "How do we deal with that?"

Ricchiazzi did not answer a question about who wrote the articles about Canada. He told the Star and BuzzFeed News that "there were primarily three individuals who contributed to those reports."

He said he kept their names off the stories because "many of the folks who write for me would lose their jobs immediately upon it being discovered."

Ricchiazzi said his involvement in politics does not affect his ability to report news.

"I feel absolutely no need to maintain neutrality, and think that critical journalism with an honest perspective is indeed better journalism," he said.

In the past, Ricchiazzi has offered to skew his coverage in exchange for cash. In a 2010 email obtained by BuzzFeed News and the Star, he asked if a local political candidate wanted to purchase content in the City Politic, another website he runs.

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“Fees are as follows: positive articles about your candidacy are \$200; negative articles about your opponents are \$400; and an editorial endorsement is \$300,” the email read.

Asked about the email, he said: “The value proposition was not appropriately articulated (and wildly underpriced).”

Ricchiazzi has denied that these kinds of transactions continue, but on at least two occasions he has accepted payments from groups that support candidates and provided them with positive coverage.

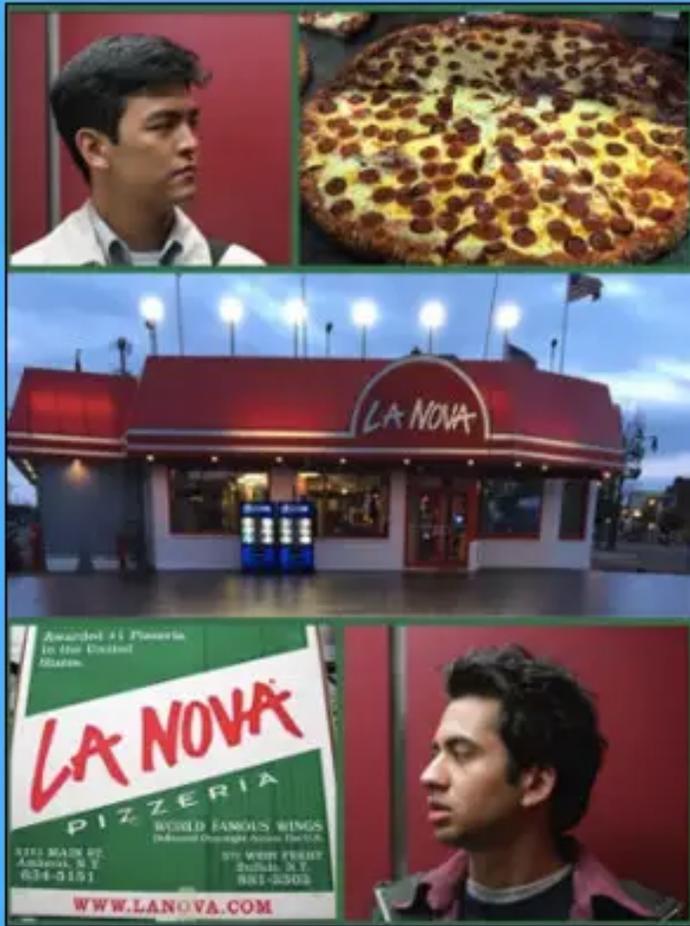
Earlier this year, Ricchiazzi received \$6,000 US from a political committee formed to elect Peter A. Reese for Erie County executive, according to [campaign finance disclosures](#). At the same time, the Buffalo Chronicle published three stories supportive of Reese’s legal battle to be added to the ballot. No disclosure of the payments is mentioned in the pieces.

“Peter Reese retained me as a consultant for a very short period of time,” Ricchiazzi said. “Those fees were not in exchange for advertising or content.”

Last year, Ricchiazzi received \$2,000 and the Buffalo Chronicle received \$1,000 from a political committee supporting Joel Giambra’s run for governor of New York, according to [election records](#).

The website posted at least five articles supporting Giambra’s candidacy, including one headlined: “Giambra, a Proud Moderate, Seeks the GOP Nomination With a Bold Plan.”

Ricchiazzi said the payments were “for consulting services rendered.”



JUDGE FRANK R. BAYGER
NEW YORK STATE SUPREME COURT JUSTICE (RETIRED)



55 YEARS AS A
PRACTICING LAWYER
& NEW YORK STATE
SUPREME COURT
JUSTICE

EXPERIENCED WHEN YOU NEED IT MOST

Buffalo Chronicle

Aside from its content, Ricchiazzi's site appears to mislead readers when it comes to its ads. While ads for a local pizzeria owner and Frank R. Bayger, a retired New York State Supreme Court judge, appeared on the Buffalo Chronicle, both people said they had never heard of the site.

"Whoever is doing this, it could be harmful to me. I cherish my reputation. I'm a very active trial lawyer," Bayger said.

Asked about the ads, Ricchiazzi said that he pays for the Buffalo Chronicle out of his own pocket and gives most of the ad space away for free.

"Some of the advertisements that appear may have been sold through third party advertising sales agents," he said. "Given that I don't charge for ads anyways, I wasn't too concerned with it."

BuzzFeed News and the Toronto Star are investigating the ways in which political parties, third-party pressure groups, foreign powers, and individuals are influencing Canada's political debate in the run-up to this fall's federal election. This report was published as part of that collaboration.



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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-3371

DONALD J. TRUMP FOR PRESIDENT, INC.;
LAWRENCE ROBERTS; DAVID JOHN HENRY,

Appellants

v.

SECRETARY COMMONWEALTH OF PENNSYLVANIA;
ALLEGHENY COUNTY BOARD OF ELECTIONS; CENTRE COUNTY BOARD
OF ELECTIONS; CHESTER COUNTY BOARD OF ELECTIONS; DELAWARE
COUNTY BOARD OF ELECTIONS; MONTGOMERY COUNTY BOARD OF
ELECTIONS; NORTHAMPTON COUNTY BOARD OF ELECTIONS;
PHILADELPHIA COUNTY BOARD OF ELECTIONS

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 4:20-cv-02078)
District Judge: Honorable Matthew W. Brann

Submitted Under Third Circuit L.A.R. 34.1(a)
on November 25, 2020

Before: SMITH, *Chief Judge*, and CHAGARES and BIBAS, *Circuit Judges*

(Filed: November 27, 2020)

OPINION*

* This disposition is not an opinion of the full Court and, under I.O.P. 5.7, is not binding precedent.

BIBAS, *Circuit Judge*.

Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.

The Trump Presidential Campaign asserts that Pennsylvania's 2020 election was unfair. But as lawyer Rudolph Giuliani stressed, the Campaign "doesn't plead fraud. ... [T]his is not a fraud case." Mot. to Dismiss Hr'g Tr. 118:19–20, 137:18. Instead, it objects that Pennsylvania's Secretary of State and some counties restricted poll watchers and let voters fix technical defects in their mail-in ballots. It offers nothing more.

This case is not about whether those claims are true. Rather, the Campaign appeals on a very narrow ground: whether the District Court abused its discretion in not letting the Campaign amend its complaint a second time. It did not.

Most of the claims in the Second Amended Complaint boil down to issues of state law. But Pennsylvania law is willing to overlook many technical defects. It favors counting votes as long as there is no fraud. Indeed, the Campaign has already litigated and lost many of these issues in state courts.

The Campaign tries to repackage these state-law claims as unconstitutional discrimination. Yet its allegations are vague and conclusory. It never alleges that anyone treated the Trump campaign or Trump votes worse than it treated the Biden campaign or Biden votes. And federal law does not require poll watchers or specify how they may observe. It also says nothing about curing technical state-law errors in ballots. Each of these defects is fatal,

and the proposed Second Amended Complaint does not fix them. So the District Court properly denied leave to amend again.

Nor does the Campaign deserve an injunction to undo Pennsylvania's certification of its votes. The Campaign's claims have no merit. The number of ballots it specifically challenges is far smaller than the roughly 81,000-vote margin of victory. And it never claims fraud or that any votes were cast by illegal voters. Plus, tossing out millions of mail-in ballots would be drastic and unprecedented, disenfranchising a huge swath of the electorate and upsetting all down-ballot races too. That remedy would be grossly disproportionate to the procedural challenges raised. So we deny the motion for an injunction pending appeal.

I. BACKGROUND

A. Pennsylvania election law

In Pennsylvania, each county runs its own elections. 25 Pa. Stat. §2641(a). Counties choose and staff polling places. §2642(b), (d). They buy their own ballot boxes and voting booths and machines. §2642(c). They even count the votes and post the results. §2642(k), (l). In all this, counties must follow Pennsylvania's Election Code and regulations. But counties can, and do, adopt rules and guidance for election officers and electors. §2642(f). And they are charged with ensuring that elections are "honestly, efficiently, and uniformly conducted." §2642(g).

1. *Poll watchers and representatives.* Counties must admit qualified poll "watchers" to observe votes being tallied. 25 Pa. Stat. §2650(a). Poll watchers must be registered to vote in the county where they will serve. §2687(b). Each candidate can pick two poll watchers per election district; each political party, three. §2687(a). The poll watchers

remain at the polling place while election officials count in-person ballots. § 2687(b). They can ask to check voting lists. *Id.* And they get to be present when officials open and count all the mail-in ballots. § 3146.8(b). Likewise, candidates’ and political parties’ “representatives” may be present when absentee and mail-in ballots are inspected, opened, or counted, or when provisional ballots are examined. §§ 2602(a.1), (q.1), 3050(a.4)(4), 3146.8(g)(1.1) & (2); *see also* § 3050(a.4)(12) (defining provisional ballots as those cast by voters whose voter registration cannot be verified right away).

Still, counties have some control over these poll watchers and representatives. The Election Code does not tell counties how they must accommodate them. Counties need only allow them “in the polling place” or “in the room” where ballots are being inspected, opened, or counted. §§ 2687(b), 3050(a.4)(4), 3146.8(g)(1.1) & (2). Counties are expected to set up “an enclosed space” for vote counters at the polling place, and poll watchers “shall remain outside the enclosed space.” § 2687(b). So the counties decide where the watchers stand and how close they get to the vote counters.

2. *Mail-in ballots.* For decades, Pennsylvania let only certain people, like members of the military and their families, vote by mail. *See, e.g.*, 25 Pa. Stat. § 3146.1. But last year, as part of a bipartisan election reform, Pennsylvania expanded mail-in voting. Act of Oct. 31, 2019, Pub. L. No. 552, sec. 8, § 1310-D, 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421). Now, any Pennsylvania voter can vote by mail for any reason. *See* 25 Pa. Stat. §§ 2602(t), 3150.11(a).

To vote by mail, a Pennsylvania voter must take several steps. First, he (or she) must ask the State (Commonwealth) or his county for a mail-in ballot. 25 Pa. Stat. § 3150.12(a).

To do that, he must submit a signed application with his name, date of birth, address, and other information. §3150.12(b)–(c). He must also provide a driver’s license number, the last four digits of his Social Security number, or the like. §§2602(z.5), 3150.12b(a), (c). Once the application is correct and complete, the county will approve it. *See* §§3150.12a(a), 3150.12b.

Close to the election, the county will mail the voter a mail-in ballot package. §3150.15. The package has a ballot and two envelopes. The smaller envelope (also called the secrecy envelope) is stamped “Official Election Ballot.” §3150.14(a). The larger envelope is stamped with the county board of election’s name and address and bears a printed voter declaration. *Id.*

Next, the voter fills out the ballot. §3150.16(a). He then folds the ballot; puts it into the first, smaller secrecy envelope; and seals it. *Id.* After that, he puts the secrecy envelope inside the larger envelope and seals that too. *Id.* He must also “fill out, date and sign the declaration printed” on the outside of the larger envelope. §§3150.16(a), 3150.14(b). The declaration for the November 2020 election read thus:

I hereby declare that I am qualified to vote from the below stated address at this election; that I have not already voted in this election; and I further declare that I marked my ballot in secret. I am qualified to vote the enclosed ballot. I understand I am no longer eligible to vote at my polling place after I return my voted ballot. However, if my ballot is not received by the county, I understand I may only vote by provisional ballot at my polling place, unless I surrender my balloting materials, to be voided, to the judge of elections at my polling place.

[BAR CODE]

Voter, sign or mark here/Votante firme o mar[q]ue aqui

X

Date of signing (MM/DD/YYYY)/Fecha de firme (MM/DD/YYYY)

Voter, print name/Votante, nombre en letra de impreta

In re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, Nos. 31–35 EAP & 29 WAP 2020, ___ A.3d ___, 2020 WL 6875017, at *4 (Pa. Nov. 23, 2020). Once the voter assembles the ballot packet, he can mail it back or deliver it in person. 25 Pa. Stat. § 3150.16(a).

Not every voter can be expected to follow this process perfectly. Some forget one of the envelopes. Others forget to sign on the dotted line. Some major errors will invalidate a ballot. For instance, counties may not count mail-in ballots that lack secrecy envelopes. *Pa. Dem. Party v. Boockvar*, 238 A.3d 345, 378–80 (Pa. 2020). But the Election Code says nothing about what should happen if a county notices these errors before election day. Some counties stay silent and do not count the ballots; others contact the voters and give them a chance to correct their errors.

B. Facts and procedural history

On appeal from the dismissal of a complaint, we take the factual allegations as true:

1. *Mail-in voting*. For months, Pennsylvanians went to the polls, so to speak. The first batch of mail-in ballots went out to voters in late September. As they trickled back in, election officials noticed that some voters had not followed the rules. Some ballots were

not in secrecy envelopes, so those packages were lighter and thinner than complete ballot packages. Others had declarations that voters had not completed. Some counties did not notify voters about these defective ballots. Others, including the counties named in this suit, decided to reach out to these voters to let them cure their mistakes by voting provisionally on Election Day or asking for a replacement ballot.

2. *Election Day*. Though more than two million Pennsylvanians voted by mail, even more voted in person. On Election Day, November 3, the Campaign set up poll watchers at polling places around the Commonwealth. Appellees' election officials kept poll watchers and representatives away from where ballots were opened, counted, and tallied. In Philadelphia, for instance, poll watchers were kept six to twenty-five feet back from officials. In comparison, other, "Republican[-]controlled" counties did give the Campaign's poll watchers and representatives full access. Second Am. Compl. ¶¶ 151, 154.

In all, nearly seven million Pennsylvanians voted, more than a third of them by mail. *Unofficial Returns for the 2020 Presidential Election*, Pa. Dep't of State, <https://www.electionreturns.pa.gov/> (last visited Nov. 27, 2020). As of today, former Vice President Biden leads President Trump in Pennsylvania by 81,660 votes. *Id.*

Pennsylvania's counties certified their election results by the November 23 certification deadline. 25 Pa. Stat. § 2642(k). The next morning, the Secretary of State (technically, Secretary of the Commonwealth) certified the vote totals, and the Governor signed the Certificate of Ascertainment and sent it to the U.S. Archivist. *Department of State Certifies Presidential Election Results*, PA Media, <https://www.media.pa.gov/Pages/State-details.aspx?newsid=435> (last visited Nov. 27, 2020). The certified margin of victory was 80,555 votes. *Id.*

3. *This lawsuit.* Almost a week after the election, the Campaign (as well as two voters) sued seven Pennsylvania counties and Secretary of State Kathy Boockvar. It alleged that they had violated the Due Process, Equal Protection, and Electors and Elections Clauses of the U.S. Constitution by taking two basic actions: First, the counties (encouraged by Secretary Boockvar) identified defective mail-in ballots early and told voters how to fix them. Second, they kept poll watchers and representatives from watching officials count all ballots.

So far, the Campaign has filed or tried to file three complaints. The original Complaint, filed November 9, set out six counts (plus a duplicate). After Boockvar and the counties moved to dismiss, on November 15 the Campaign filed a First Amended Complaint as of right, dropping four of the six counts (plus the duplicate), including all the counts relating to poll watchers and representatives. The Campaign sought a preliminary injunction to block certifying the election results. Boockvar and the counties again moved to dismiss. On November 18, the Campaign sought to file a Second Amended Complaint, resurrecting four dropped claims from the original Complaint and adding three more about how Philadelphia had blocked poll watching.

The District Court ended these volleys, denying leave to file the Second Amended Complaint. Instead, it dismissed the First Amended Complaint with prejudice and denied the Campaign's motion for a preliminary injunction as moot. *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-cv-02078, ___ F. Supp. 3d ___, 2020 WL 6821992 (M.D. Pa. Nov. 21, 2020). In doing so, it held that the individual voters lacked standing. *Id.* at *5–

6. We commend the District Court for its fast, fair, patient handling of this demanding litigation.

4. *This appeal.* The Campaign filed this appeal on Sunday, November 22, and we granted its motion to expedite. The Campaign filed its brief and another motion November 23; opposing briefs and filings arrived the next day. We are issuing this opinion nonprecedentially so we can rule by November 27.

The Campaign does not challenge the District Court’s finding that the voters lacked standing, so we do not consider their claims. On appeal, it seeks only narrow relief: to overturn the District Court’s decision not to let it amend its complaint again. We address that claim in Part II. Separately, the Campaign asks us for an injunction to prevent the certified vote totals from taking effect. We address that claim in Part III.

II. THE DISTRICT COURT PROPERLY DENIED LEAVE TO AMEND THE COMPLAINT AGAIN

After one amendment, the District Court denied the Campaign’s motion to amend the complaint a second time. We review that denial for abuse of discretion. *Premier Comp. Sol., LLC v. UPMC*, 970 F.3d 316, 318–19 (3d Cir. 2020). But on any standard of review, the court got it right.

Courts should grant leave to amend “freely ... when justice so requires.” Fed. R. Civ. P. 15(a)(2). In civil-rights cases, that means granting leave unless “amendment would be futile or inequitable.” *Vorchheimer v. Phila. Owners Ass’n*, 903 F.3d 100, 113 (3d Cir. 2018); *Cureton v. NCAA*, 252 F.3d 267, 272–73 (3d Cir. 2001) (giving undue delay as an example of inequity). Here, the Campaign’s request fails as both inequitable and futile.

A. The Campaign’s delay was undue, given its stress on needing to resolve the case by November 23

When the Campaign was before the District Court, it focused its arguments on the need to resolve the case by Pennsylvania’s deadline for counties to certify their votes: Monday, November 23. Indeed, all three iterations of the complaint focused their prayers for relief on blocking the certification of the vote tally. The Campaign said it could get no “meaningful remedy” after that date. Br. in Supp. of Mot. for TRO & PI, Dkt. 89-1, at 4.

The Campaign filed its First Amended Complaint on November 15, eight days before the certification deadline. In response to several pending motions to dismiss, it dropped many of the challenged counts from the original Complaint. It did not then move to file a Second Amended Complaint until November 18, when its opposition to the new motions to dismiss was due. And it did not file a brief in support of that motion until Friday, November 20. Certification was three days away.

As the District Court rightly noted, amending that close to the deadline would have delayed resolving the issues. True, delay alone is not enough to bar amendment. *Cureton*, 252 F.3d at 273. But “at some point, the delay will become ‘undue,’ placing an unwarranted burden on the court.” *Id.* (quoting *Adams v. Gould, Inc.*, 739 F.2d 858, 868 (3d Cir. 1984)). The Campaign’s motion would have done just that. It would have mooted the existing motions to dismiss and required new briefing, possibly new oral argument, and a reasoned judicial opinion within seventy-two hours over a weekend. That is too much to ask—especially since the proposed Second Amended Complaint largely repleaded many claims abandoned by the first one. *Cf. Rolo v. City Investing Co. Liquidating Tr.*, 155 F.3d 644, 654–

55 (3d Cir. 1998) (affirming denial of leave to amend because the movant sought largely to “replead facts and arguments that could have been pled much earlier”).

Having repeatedly stressed the certification deadline, the Campaign cannot now pivot and object that the District Court abused its discretion by holding the Campaign to that very deadline. It did not.

B. Amending the Complaint again would have been futile

The Campaign focuses on critiquing the District Court’s discussion of undue delay. Though the court properly rested on that ground, we can affirm on any ground supported by the record. Another ground also supports its denial of leave to amend: it would have been futile.

1. *The Campaign had to plead plausible facts, not just conclusory allegations.* Plaintiffs must do more than allege conclusions. Rather, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* The Second Amended Complaint does not meet *Twombly* and *Iqbal*’s baseline standard of specifics.

To start, note what it does not allege: fraud. Indeed, in oral argument before the District Court, Campaign lawyer Rudolph Giuliani conceded that the Campaign “doesn’t plead fraud.” Mot. to Dismiss Hr’g Tr. 118:19–20 (Nov. 17, 2020). He reiterated: “If we had alleged fraud, yes, but this is not a fraud case.” *Id.* at 137:18.

Though it alleges many conclusions, the Second Amended Complaint is light on facts. Take the nearly identical paragraphs introducing Counts One, Two, Four, and Six: “Democrats who controlled the Defendant County Election Boards engaged in a deliberate scheme of intentional and purposeful discrimination ... by excluding Republican and Trump Campaign observers from the canvassing of the mail ballots in order to conceal their decision not to enforce [certain ballot] requirements.” Second Am. Compl. ¶¶167, 193, 222, 252. That is conclusory. So is the claim that, “[u]pon information and belief, a substantial portion of the approximately 1.5 million absentee and mail votes in Defendant Counties should not have been counted.” *Id.* ¶¶168, 194, 223, 253. “Upon information and belief” is a lawyerly way of saying that the Campaign does not know that something is a fact but just suspects it or has heard it. “While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.” *Iqbal*, 556 U.S. at 679. Yet the Campaign offers no specific facts to back up these claims.

2. *The Campaign has already litigated and lost most of these issues.* Many of the Second Amended Complaint’s claims have already had their day in court. The Campaign cannot use this lawsuit to collaterally attack those prior rulings. On Counts One, Two, Four, and Six, the Campaign has already litigated whether ballots that lack a handwritten name, address, or date on the outer envelope must be disqualified. *See In re: Canvass of Absentee and Mail-in Ballots*, 2020 WL 6875017, at *1. The Pennsylvania Supreme Court ruled against the Campaign, holding: “[T]he Election Code does not require boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot’s outer envelope but did not handwrite their name, their address,

and/or date, where no fraud or irregularity has been alleged.” *Id.* at *1. That holding undermines the Campaign’s suggestions that defective ballots should not have been counted.

Counts One and Two also challenge the requirement that poll watchers be registered electors of the county they wish to observe and that observers be Pennsylvania lawyers. But a federal district court has already held “that the county-residency requirement for poll watching does not, as applied to the particular circumstances of this election, burden any of [the Campaign’s] fundamental constitutional rights.” *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, ___ F. Supp. 3d ___, 2020 WL 5997680, at *66 (W.D. Pa. Oct. 10, 2020). The Campaign never appealed that decision, so it is bound by it.

Count Seven alleges that Philadelphia’s Board of Elections violated due process by obstructing poll watchers and representatives. But nothing in the Due Process Clause requires having poll watchers or representatives, let alone watchers from outside a county or less than eighteen feet away from the nearest table. The Campaign cites no authority for those propositions, and we know of none. (Ditto for notice-and-cure procedures.) And the Campaign litigated and lost that claim under state law too. The Pennsylvania Supreme Court held that the Election Code requires only that poll watchers be in the room, not that they be within any specific distance of the ballots. *In re Canvassing Observation Appeal of: City of Phila. Bd. of Electors*, No. 30 EAP 2020, ___ A.3d ___, 2020 WL 6737895, at *8–9 (Pa. Nov. 17, 2020).

The Campaign does not even challenge the dismissal of Counts Three, Five, and Nine, the Electors and Elections Clause counts. It concedes that under our recent decision, it lacks standing to pursue alleged violations of those clauses. *Bognet v. Sec’y Commonwealth of*

Pa., No. 20-3214, ___ F.3d ___, 2020 WL 6686120, at *6–9 (3d Cir. Nov. 13, 2020). Given its concession, we need not consider the issue any more.

The Second Amended Complaint thus boils down to the equal-protection claims in Counts Two, Four, Six, and Eight. They require not violations of state law, but discrimination in applying it. Those claims fail too.

3. *The Campaign never pleads that any defendant treated the Trump and Biden campaigns or votes differently.* A violation of the Equal Protection Clause requires more than variation from county to county. It requires unequal treatment of similarly situated parties. But the Campaign never pleads or alleges that anyone treated it differently from the Biden campaign. Count One alleges that the counties refused to credential the Campaign’s poll watchers or kept them behind metal barricades, away from the ballots. It never alleges that other campaigns’ poll watchers or representatives were treated differently. Count Two alleges that an unnamed lawyer was able to watch all aspects of voting in York County, while poll watchers in Philadelphia were not. It also makes a claim about one Jared M. Mellott, who was able to poll watch in York County. Counts Four and Six allege that poll watcher George Gallenthin had no issues in Bucks County but was barred from watching in Philadelphia. And Count Eight alleges that Philadelphia officials kept Jeremy Mercer too far away to verify that ballots were properly filled out. None of these counts alleges facts showing improper vote counting. And none alleges facts showing that the Trump campaign was singled out for adverse treatment. The Campaign cites no authority suggesting that an actor discriminates by treating people equally while harboring a partisan motive, and we know of none.

These county-to-county variations do not show discrimination. “[C]ounties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state.” *Donald J. Trump for President, Inc.*, 2020 WL 5997680, at *44 (collecting cases). Even when boards of elections “vary ... considerably” in how they decide to reject ballots, those local differences in implementing statewide standards do not violate equal protection. *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 635–36 (6th Cir. 2016); *see also Wexler v. Anderson*, 452 F.3d 1226, 1231–33 (11th Cir. 2006) (recognizing that equal protection lets different counties use different voting systems).

Nor does *Bush v. Gore* help the Campaign. 531 U.S. 98 (2000) (per curiam). There, the Florida Supreme Court had ratified treating ballots unequally. *Id.* at 107. That was because the principle it set forth, the “intent of the voter,” lacked *any* “specific standards to ensure its equal application.” *Id.* at 105–06. The lack of any standards at all empowered officials to treat ballots arbitrarily, violating equal protection. *Id.* Here, by contrast, Pennsylvania’s Election Code gives counties specific guidelines. To be sure, counties vary in implementing that guidance, but that is normal. Reasonable county-to-county variation is not discrimination. *Bush v. Gore* does not federalize every jot and tittle of state election law.

4. *The relief sought—throwing out millions of votes—is unprecedented.* Finally, the Second Amended Complaint seeks breathtaking relief: barring the Commonwealth from certifying its results or else declaring the election results defective and ordering the Pennsylvania General Assembly, not the voters, to choose Pennsylvania’s presidential electors. It cites no authority for this drastic remedy.

The closest the Campaign comes to justifying the relief it seeks is citing *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994). But those facts were a far cry from the ones here. In *Marks*, the district court found that the Stinson campaign had orchestrated “massive absentee ballot fraud, deception, intimidation, harassment and forgery.” *Id.* at 887 (quoting district court’s tentative findings). It had lied to voters, deceived election officials, and forged ballots. *Id.* at 877. We remanded that case, instructing that “the district court should not direct the certification of a candidate unless it finds, on the basis of record evidence, that the designated candidate would have won the election but for wrongdoing.” *Id.* at 889. And that seemed likely: the Stinson campaign had gotten about 600 net absentee-ballot applications (roughly 1000 minus 400 that were later rejected), more than the 461-vote margin of victory. *Id.* at 876–77.

Here, however, there is no clear evidence of massive absentee-ballot fraud or forgery. On the contrary, at oral argument in the District Court, the Campaign specifically disavowed any claim of fraud. And the margin of victory here is not nearly as close: not 461 votes, but roughly 81,000.

Though district courts should freely give leave to amend, they need not do so when amendment would be futile. Because the Second Amended Complaint would not survive a motion to dismiss, the District Court properly denied leave to file it.

III. NO STAY OR INJUNCTION IS WARRANTED

We could stop here. Once we affirm the denial of leave to amend, this case is over. Still, for completeness, we address the Campaign’s emergency motion to stay the effect of certification. No stay or injunction is called for.

Though the Campaign styles its motion as seeking a stay or preliminary injunction, what it really wants is an injunction pending appeal. But it neither requested that from the District Court during the appeal nor showed that it could not make that request, as required by Federal Rule of Appellate Procedure 8(a)(2)(A). That failure bars the motion.

Even if we could grant relief, we would not. Injunctions pending appeal, like preliminary injunctions, are “extraordinary remed[ies] never awarded as of right.” *Winter v. NRDC*, 555 U.S. 7, 24 (2008). For a stay or injunction pending appeal, the movant must show both (1) a “strong” likelihood of success on the merits and (2) irreparable injury absent a stay or injunction. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The first two factors are “the most critical.” *Nken v. Holder*, 556 U.S. 418, 434 (2009). After that, we also balance (3) whether a stay or injunction will injure other interested parties (also called the balance of equities) and (4) the public interest. *Hilton*, 481 U.S. at 776; *In re Revel AC, Inc.*, 802 F.3d 558, 568–71 (3d Cir. 2015). None of the four factors favors taking this extraordinary step.

A. The Campaign has no strong likelihood of success on the merits

As discussed, the Campaign cannot win this lawsuit. It conceded that it is not alleging election fraud. It has already raised and lost most of these state-law issues, and it cannot relitigate them here. It cites no federal authority regulating poll watchers or notice and cure. It alleges no specific discrimination. And it does not contest that it lacks standing under the Elections and Electors Clauses. These claims cannot succeed.

B. The Campaign faces no irreparable harm

The Campaign has not shown that denying relief will injure it. “Upon information and belief,” it suspects that many of the 1.5 million mail-in ballots in the challenged counties were improperly counted. Second Am. Compl. ¶¶ 168, 194, 223, 253. But it challenges no specific ballots. The Campaign alleges only that at most three specific voters cast ballots that were not counted. *Id.* ¶ 237 (one voter); First Am. Compl. ¶¶ 15–16, 112 (three). And it never alleges that anyone except a lawful voter cast a vote. Of the seven counties whose notice-and-cure procedures are challenged, four (including the three most populous) represented that they gave notice to only about 6,500 voters who sent in defective ballot packages. Allegheny Cty. Opp. Mot. TRO & PI 7–8, D. Ct. Dkt. No. 193 (Nov. 20, 2020). The Campaign never disputed these numbers or alleged its own. Even if 10,000 voters got notice and cured their defective ballots, and every single one then voted for Biden, that is less than an eighth of the margin of victory.

Without more facts, we will not extrapolate from these modest numbers to postulate that the number of affected ballots comes close to the certified margin of victory of 80,555 votes. Denying relief will not move the needle.

Plus, states are primarily responsible for running federal elections. U.S. Const. art. I, §4, cl. 1; 3 U.S.C. §5. Pennsylvania law has detailed mechanisms for disputing election results. 25 Pa. Stat. §§ 3261–3474. Because the Campaign can raise these issues and seek relief through state courts and then the U.S. Supreme Court, any harm may not be irreparable. *Touchston v. McDermott*, 234 F.3d 1130, 1132–33 (11th Cir. 2000) (per curiam) (en banc).

C. The balance of equities opposes disenfranchising voters

Nor would granting relief be equitable. The Campaign has already litigated and lost most of these issues as garden-variety state-law claims. It now tries to turn them into federal constitutional claims but cannot. *See Bognet*, 2020 WL 6686120, at *11.

Even if it could, it has delayed bringing this suit. For instance, in proposed Count Four, it challenges giving voters notice and letting them cure ballot defects as violating equal protection. The Campaign could have disputed these practices while they were happening or during the canvassing period. Instead, it waited almost a week after Election Day to file its original complaint, almost another week to amend it, and then another three days to amend it again. Its delay is inequitable, and further delay would wreak further inequity.

And the Campaign's charges are selective. Though Pennsylvanians cast 2.6 million mail-in ballots, the Campaign challenges 1.5 million of them. It cherry-picks votes cast in "Democratic-heavy counties" but not "those in Republican-heavy counties." Second Am. Compl. ¶8. Without compelling evidence of massive fraud, not even alleged here, we can hardly grant such lopsided relief.

Granting relief would harm millions of Pennsylvania voters too. The Campaign would have us set aside 1.5 million ballots without even alleging fraud. As the deadline to certify votes has already passed, granting relief would disenfranchise those voters or sidestep the expressed will of the people. Tossing out those ballots could disrupt every down-ballot race as well. There is no allegation of fraud (let alone proof) to justify harming those millions of voters as well as other candidates.

D. The public interest favors counting all lawful voters' votes

Lastly, relief would not serve the public interest. Democracy depends on counting all lawful votes promptly and finally, not setting them aside without weighty proof. The public must have confidence that our Government honors and respects their votes.

What is more, throwing out those votes would conflict with Pennsylvania election law. The Pennsylvania Supreme Court has long “liberally construed” its Election Code “to protect voters’ right to vote,” even when a ballot violates a technical requirement. *Shambach v. Bickhart*, 845 A.2d 793, 802 (Pa. 2004). “Technicalities should not be used to make the right of the voter insecure.” *Appeal of James*, 105 A.2d 64, 66 (Pa. 1954) (internal quotation marks omitted). That court recently reiterated: “[T]he Election Code should be liberally construed so as not to deprive, *inter alia*, electors of their right to elect a candidate of their choice.” *Pa. Dem. Party*, 238 A.3d at 356. Thus, unless there is evidence of fraud, Pennsylvania law overlooks small ballot glitches and respects the expressed intent of every lawful voter. *In re: Canvass of Absentee and Mail-in Ballots*, 2020 WL 6875017, at *1 (plurality opinion). In our federalist system, we must respect Pennsylvania’s approach to running elections. We will not make more of ballot technicalities than Pennsylvania itself does.

* * * * *

Voters, not lawyers, choose the President. Ballots, not briefs, decide elections. The ballots here are governed by Pennsylvania election law. No federal law requires poll watchers or specifies where they must live or how close they may stand when votes are counted. Nor does federal law govern whether to count ballots with minor state-law defects or let voters

cure those defects. Those are all issues of state law, not ones that we can hear. And earlier lawsuits have rejected those claims.

Seeking to turn those state-law claims into federal ones, the Campaign claims discrimination. But its alchemy cannot transmute lead into gold. The Campaign never alleges that any ballot was fraudulent or cast by an illegal voter. It never alleges that any defendant treated the Trump campaign or its votes worse than it treated the Biden campaign or its votes. Calling something discrimination does not make it so. The Second Amended Complaint still suffers from these core defects, so granting leave to amend would have been futile.

And there is no basis to grant the unprecedented injunction sought here. First, for the reasons already given, the Campaign is unlikely to succeed on the merits. Second, it shows no irreparable harm, offering specific challenges to many fewer ballots than the roughly 81,000-vote margin of victory. Third, the Campaign is responsible for its delay and repetitive litigation. Finally, the public interest strongly favors finality, counting every lawful voter's vote, and not disenfranchising millions of Pennsylvania voters who voted by mail. Plus, discarding those votes could disrupt every other election on the ballot.

We will thus affirm the District Court's denial of leave to amend, and we deny an injunction pending appeal. The Campaign asked for a very fast briefing schedule, and we have granted its request. Because the Campaign wants us to move as fast as possible, we also deny oral argument. We grant all motions to file overlength responses, to file amicus briefs, and to supplement appendices. We deny all other outstanding motions as moot. This Court's mandate shall issue at once.